

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS**

State of Minnesota, by
Dolores Fridge, Commissioner,
Department of Human Rights,

Complainant,

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-
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vs.

**FINDINGS OF FACT,
CONCLUSIONS, AND ORDER**

Tim McPherson and Katherine
McPherson d/b/a Continental
Telemarketing,

Respondents.

Administrative Law Judge Bruce H. Johnson conducted a hearing in this contested case proceeding beginning at 9:30 p.m. on Tuesday, May 5, 1998, at the Minnesota Office of Administrative Hearings, 100 Washington Square, Suite 1700, Minneapolis, Minnesota.

Andrea Mitau Kircher, Assistant Attorney General, Suite 1200, NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, appeared on behalf of the Minnesota Department of Human Rights. The Respondents, Timothy and Katherine McPherson, did not appear at the hearing, nor did anyone else appear on their behalf. The record closed on June 30, 1998, when the Administrative Law Judge denied the McPhersons' motion to reopen the record.

STATEMENT OF THE ISSUES

(1) Did Timothy and Katherine McPherson, doing business as Continental Telemarketing, discriminate against Jenny Gunsallus and violate the Minnesota Human Rights Act^[1] by refusing to hire her for a position with Continental Telemarketing because she was pregnant?

(2) Are Ms. Gunsallus and the Department, as the case may be, entitled to compensatory damages, damages for mental anguish and suffering, punitive damages, and attorney's fees and costs; and if so, in what amounts; and

(3) Should a civil penalty be assessed against Mr. and Mrs. McPherson?

Based upon the record in this contested case proceeding, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Commissioner of Human Rights began this contested case proceeding by issuing a Notice of and Order for Hearing, along with a Complaint, on January 13, 1998. That Notice scheduled a hearing on the matters raised by the Complaint for May 5, 1998, at 9:30 a.m. at the Office of Administrative Hearings, 100 Washington Square Building (Washington Avenue South), Suite 1700, Minneapolis, Minnesota.

2. The Notice of and Order for Hearing contained the following statements:

You are required by Minn. R. 5000.1200 to serve an answer upon the Administrative Law Judge and the complainant's attorney within twenty (20) days after service of the complaint upon you. If you intend to appear at the hearing, you are further required by Minn. R. 1400.5700 to file a Notice of Appearance with the Administrative Law Judge within twenty (20) days after service of the Notice of and Order for Hearing. Failure to answer shall and failure to appear at the hearing may be deemed an admission of the allegations contained in the complaint and may result in the award to the complainant of the relief sought in this action.

3. On January 13, 1998, the Office of the Attorney General served copies of the Notice of and Order for Hearing and the Complaint on both Timothy and Katherine McPherson, by certified U. S. Mail, at the following address: 2233 University Avenue West, Suite 225, St. Paul, MN 55114. Those copies of the Notice and the Complaint were returned by the U. S. Postal Service to the Office of the Attorney General as being undeliverable at that address.^[2]

4. On January 27, 1998, the Office of the Attorney General served copies of the Notice of and Order for Hearing and the Complaint on both Timothy and Katherine McPherson, by certified U. S. Mail, at the following address: 6070 North 50th Street, Oakdale, MN 55128. Again, those copies of the Notice and the Complaint were returned by the U. S. Postal Service to the Office of the Attorney General as being undeliverable at that address.^[3]

5. On January 27, 1998, the Office of the Attorney General also served copies of the Notice of and Order for Hearing and the Complaint on both Timothy and Katherine McPherson, by certified U. S. Mail, at the following address: 2697 County Road E E#520, St. Paul, MN 55110-4908. Those copies of the Notice and the Complaint were also returned by the U. S. Postal Service to the Office of the Attorney General as being undeliverable at that address.^[4]

6. On February 5, 1998, the Office of the Attorney General served copies of the Notice of and Order for Hearing and the Complaint on both Timothy and Katherine McPherson, by certified U. S. Mail, at the following address: 10198 – 101st Street North, Stillwater, MN 55082. Those copies of the Notice and the Complaint appear to have been delivered but the return receipts were not returned to the Office of the Attorney General.^[5]

7. Finally, on March 10, 1998, the Office of the Sheriff of Washington County, Minnesota, personally served Timothy McPherson with copies of the Notice of and Order for Hearing and the Complaint at 10198 - 101st Street, Stillwater, MN 55082.^[6]

8. Neither Timothy nor Katherine McPherson filed an answer to the Complaint within twenty days after being served with the Complaint, as instructed by the Notice of and Order for Hearing. In fact, they have never filed an answer to the Complaint.

9. Neither Timothy nor Katherine McPherson filed a notice of appearance within twenty days after being served with the Notice of and Order for Hearing, as that document instructed them to do. In fact, they have never filed a notice of appearance in connection with this contested case proceeding.

10. Neither Timothy nor Katherine McPherson appeared at the May 5, 1998, hearing either in person or through a representative, and neither made a pre-hearing request to the Administrative Law Judge to postpone the hearing or be excused from attending it.

11. Because Timothy and Katherine McPherson have violated several Office of Administrative Hearing rules by failing to file an answer to the Complaint, to file a notice of appearance, and to appear at the May 5, 1998, hearing either personally or through a representative, they are both in default, and the Administrative Law Judge may then find that the allegations contained in the Complaint are true without further proof. Specifically, the Administrative Law Judge finds that each of the following allegations are true:

a. Timothy McPherson and Katherine McPherson, when doing business as Continental Telemarketing at 2233 University Avenue West, Suite 225, St. Paul, Minnesota 55114, constituted an “employer” within the meaning of the Minnesota Human Rights Act.^[7]

b. Continental Telemarketing had job openings for customer service representatives on or about December 13, 1994.

c. Jenny Gunsallus, a pregnant woman, applied for employment as a customer service representative with Continental Telemarketing on or about December 13, 1994. At the time she applied, she was qualified for that position, and she continues to be qualified.

d. Ms. Gunsallus was interviewed for the customer service representative position by an employee of Continental Telemarketing to whom she disclosed that she was pregnant.

e. Ms. Gunsallus was not hired for the customer service representative position because she was pregnant.

f. The conduct described in subparagraphs b. through e. caused Ms. Gunsallus emotional harm and lost wages.

g. On or about May 4, 1995, Ms. Gunsallus filed a charge of sex discrimination with the Department.

h. The Department conducted an investigation into the allegations in the charge.

i. On or about February 25, 1997, the Department found probable cause to believe that Mr. and Mrs. McPherson had committed an unfair discriminatory practice.

j. The Department attempted unsuccessfully to conciliate this matter.

12. Following Continental's refusal to hire her as a customer service representative, Ms. Gunsallus experienced depression, a loss of sleep, a sense of awkwardness around other people, and a loss of self-esteem because she felt that she had been compelled to choose between having a child and having a job.^[8] She did not seek or receive professional counseling or therapy for her depression and other feelings of distress.

13. If Ms. Gunsallus had been hired by Continental as a customer service representative, she would have earned \$8.00 per hour and would have worked from 9:00 a.m. until 3:00 p.m., Mondays through Fridays. She therefore would have worked 30 hours per week, and her gross earning would have been \$240.00 per week.^[9]

14. If Ms. Gunsallus had been hired by Continental as a customer service representative, she would have continued to work in that position at least through January of 1997 although she would have taken four weeks of maternity leave when her child was born.

15. After being refused employment by Continental, Ms. Gunsallus was unemployed for most of the time until early January of 1995 when she obtained a seasonal, part-time position at Sportsman's Guide, Inc. But she did have other earnings of \$127.75 between December 15 and December 31, 1997. Beginning in early January of 1995, Ms. Gunsallus worked at Sportsman's Guide for three to four hours a night, four nights a week, until that employment was interrupted by the birth of her child.^[10] Her gross earnings from that employment in 1995 were \$950.25.^[11]

16. After taking approximately four to five weeks off after her baby was born, Ms. Gunsallus obtained a job as a nanny in San Francisco, California, which she held from August of 1995 through September of 1996. She earned \$3.50 per hour in addition to room and board and received gross earnings from that employment of \$3,052.00 in 1995 and \$6,871.75 in 1996.^[12] While in California, Ms. Gunsallus also had gross earnings of \$311.85 as a temporary, part time gymnastics coach for the City of Half Moon Bay.^[13]

17. In September of 1996, Ms. Gunsallus returned to Wisconsin, where her family lived and where she had formerly lived, and she became employed at the Grand Café Company in River Falls, Wisconsin. Her employment there consisted of making and serving coffee to customers; she also worked as the night manager. She earned \$5.50 per hour from her employment at the Grand Café Company and worked approximately 35 hours per week. Her employment there ended on December 31, 1996, and her gross earnings from that employment were \$1,902.53 in 1996.^[14]

18. In February of 1998, Ms. Gunsallus obtained employment at Gunnison, Inc., in Eau Claire, Wisconsin. That job paid her as much or more than what she would have earned at Continental.^[15]

19. If Ms. Gunsallus had worked at Continental from December 15 through December 31, 1994, she would have earned \$480.00. That must be offset by the \$127.75 in gross earnings that she actually received from other sources, and her 1994 wage loss caused by Continental's unlawful discrimination was \$352.25.

20. If Ms. Gunsallus had worked at Continental during the entire calendar year 1995, less four weeks of maternity leave, she would have earned \$11,520.00. That must be offset by the \$4,002.25 she actually received from other sources, and her 1995 wage loss caused by Continental's unlawful discrimination was \$7,517.75.

21. If Ms. Gunsallus had worked at Continental during the entire calendar year 1996, she would have earned \$12,480.00. That must be offset by the \$9,086.13 she actually received from other sources, and her 1995 wage loss caused by Continental's unlawful discrimination was \$3,393.87.

22. If Ms. Gunsallus had worked at Continental during January of 1997, she would have earned \$960.00, which was the 1997 wage loss caused by Continental's unlawful discrimination.

23. During the period from December 15, 1994, through January 31, 1997, Continental's unlawful discrimination caused Ms. Gunsallus a cumulative net wage loss, after offsetting the gross earnings she received during that period, of \$12,223.87. The accrued interest on that wage loss from the time of loss at the rates specified for use by Minnesota's state courts totals \$1,735.49.^[16] Adding the two amounts, Ms. Gunsallus' total wage loss plus interest is the sum of \$13,959.36.

24. Ms. Gunsallus has engaged in reasonable efforts to mitigate her damages.

25. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Minnesota law^[17] gives the Administrative Law Judge jurisdiction to consider and rule on the issues in this contested case proceeding.

2. Timothy and Katherine McPherson, doing business as Continental Telemarketing, were given timely and proper notice of the hearing in this contested case proceeding.

3. The Notice of and Order for Hearing and the Complaint were proper in all respects, and the Department has complied with all of the law's substantive and procedural requirements.

4. Under the rules of the Office of Administrative Hearings,^[18] Timothy and Katherine McPherson are in default as a result of their failure to appear at the hearing.

5. Also under the same rules,^[19] when a party defaults, the Administrative Law Judge may take the allegations set out in the Complaint as being true and having been proved without further evidence, and the Administrative Law Judge has chosen to do so here.

6. At the times that are relevant to this contested case proceeding, Timothy and Katherine McPherson, doing business as Continental Telemarketing, were an employer within the meaning of the Minnesota Human Rights Act.^[20]

7. The Minnesota Human Rights Act^[21] makes it unlawful for an employer to refuse to hire someone on the basis of sex. Refusing to hire a woman because she is pregnant is discrimination on the basis of sex.

8. Because of the default of Timothy and Katherine McPherson, the Department has proven that, while doing business as Continental Telemarketing, they refused to hire Ms. Gunsallus because she was pregnant and therefore unlawfully discriminated against her on the basis of her sex.

9. Timothy and Katherine McPherson, doing business as Continental Telemarketing, have the burden of proving that Ms. Gunsallus failed to mitigate her damages, and they have not met that burden.

10. The Minnesota Human Rights Act^[22] permits the Administrative Law Judge to award back pay to compensate a victim of employment discrimination for wages that would have been earned if the discrimination had not occurred. Here, Ms. Gunsallus' net wage loss from the discrimination, together with interest from the dates of loss, is \$13,959.36.

11. The Minnesota Human Rights Act^[23] also permits the Administrative Law Judge to make an award of compensatory damages of up to three times the amount of actual damages sustained by the victim of discrimination. But here, the charging party is not entitled to double or treble compensatory damages.

12. Under Minnesota law,^[24] victims of employment discrimination are entitled to compensation for mental anguish and suffering that resulted from the employment discrimination. Here, the charging party experienced mental anguish and suffering as a result of Timothy and Katherine McPherson's refusal to hire her because she was pregnant, and Ms. Gunsallus is entitled to compensation in the amount of \$5,000.00 for that mental anguish and suffering.

13. Under Minnesota law,^[25] the Administrative Law Judge may award punitive damages where there is clear and convincing evidence that the acts of the employer show a deliberate disregard for the rights or safety of others. Here, the Department and charging party failed to establish by clear and convincing evidence that the acts of Timothy and Katherine McPherson showed a deliberate disregard for the rights or safety of Ms. Gunsallus. They are therefore not entitled to a punitive damage award.

14. The Minnesota Human Rights Act^[26] requires award of a civil penalty to the state when the employer violates the Act. In so doing, the Act requires the Administrative Law Judge to take into account the seriousness and extent of the violation, the public harm occasioned by it, the financial resources of the employer, and whether the violation was intentional. There is insufficient evidence in the hearing record to establish what the financial resources of Mr. and Mrs. McPherson are. The Administrative Law Judge is therefore not ordering them to pay a civil penalty to the state.

15. Under Minnesota law,^[27] the Department is entitled to reasonable attorneys' fees and costs.

16. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

Based upon these Conclusions, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. Timothy McPherson and Katherine McPherson jointly and severally shall pay to Jenny Gunsallus damages in the amount of \$18,959.36, calculated as follows:

Compensatory	damages	for	lost	wages,	plus
interest					
\$12,223.87					
Damages for mental anguish and suffering					
\$5,000.00					
Prejudgment interest on lost wages					
\$1,735.49					

Total
\$18,959.36

2. Timothy McPherson and Katherine McPherson jointly and severally shall pay Jenny Gunsallus prejudgment interest on lost wages, as prescribed by law, in the amount of \$1,735.49.

3. Within 15 days of the date on which the Administrative Law Judge files this Order, the Department's counsel shall deliver to the Administrative Law Judge a list of work and costs incurred in representing the Department and charging party in this matter. The list shall indicate the total hours devoted to that representation, the hourly rate for each attorney working on this matter, and the total charges. The Department's counsel shall also provide affidavits from two attorneys practicing in the area of employment law attesting to the reasonableness of the fees claimed. Mr. and Mrs. McPherson shall have ten days in which to interpose objections to the reasonableness of the fees claimed. If the Department does not submit the requested documents within the time specified, the Administrative Law Judge shall conclude that it has waived any claim for attorneys' fees.

Dated this _____ day of July _____ 1998.

BRUCE H. JOHNSON
Administrative Law Judge

Reported: Tape Recorded (one tape)

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Department is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail.

^[1] Minnesota Statutes, section 363.03, subdivision 1(2)(a) (1996). (Unless otherwise specified, all references to Minnesota Statutes are to the 1996 edition.)

^[2] Affidavit of Service of Norma J. Meleen dated January 13, 1998. Testimony of Andrea Mitau Kircher.

^[3] Affidavit of Service of Norma J. Meleen dated January 27, 1998. Testimony of Andrea Mitau Kircher.

^[4] Affidavit of Service of Norma J. Meleen dated January 27, 1998. Testimony of Andrea Mitau Kircher.

^[5] Affidavit of Service of Norma J. Meleen dated February 5, 1998. Testimony of Andrea Mitau Kircher.

^[6] Affidavit of Service of Deputy Stephen W. Nelson.

^[7] Minn. Stat. § 363.01, subd. 17.

^[8] Testimony of Jenny Gunsallus.

^[9] Testimony of Jenny Gunsallus.

^[10] Testimony of Jenny Gunsallus; Exhibits 1 and 4.

^[11] Exhibits 1 and 4.

^[12] Id.

^[13] Id.

^[14] Id.

^[15] Id.

^[16] Exhibit 4.

^[17] Minnesota Statutes, sections 14.50 and 363.01.

^[18] Minnesota Rules, part 1400.6000 (1997). (Unless otherwise specified, all references to Minnesota Rules are to the 1997 edition.)

^[19] Id.

^[20] Minnesota Statutes, section 363.01, subdivision 16.

^[21] Minnesota Statutes, section 363.03, subdivision 1(2)(a).

^[22] Minnesota Statutes, section 363.071, subdivision 2.

^[23] Id.

^[24] Id.

^[25] Minnesota Statutes, section 363.071, subdivision 2, as it incorporates the standards established in Minnesota Statutes, section 549.20.

^[26] Minnesota Statutes, section 363.071, subdivision 2.

^[27] Minnesota Statutes, sections 363.071, subdivision 2, and 363.14, subdivision 3.